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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 40

UNITED STATES OF AMERICA, PETITIONER,

v.

ISKA W. CARMACK, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S PETITION FOR REHEARING.

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RESPONDENT'S PETITION FOR REHEARING.

The respondent prays the Court for a rehearing of this cause for the reason that the Court overlooked questions which are decisive of the cause and which were duly submitted by counsel for respondent.

I.

Matters decided by the lower courts based upon the Stipulation of Agreed Facts and which are decisive of this cause were overlooked by the court.

(a) The Stipulation of Agreed Facts, which is binding upon the petitioner, and the undisputed evidence in this case, which were overlooked by this court, show that the

proceedings in question were for the purpose of effecting an exchange of properties. These decisive facts and the undisputed evidence fully support the conclusions of the lower courts and the contentions of respondent and are fully stated in the opinion of the district court (R. 600-618) reported in 55 F. Supp. 555, from which we quote.

The district court (R. 608, 55 F. Supp. 555, l. c. 559) states:

"Defendant's Exhibit A is a stipulation of agreed facts entered into between the plaintiff and the defendant, Iska W. Carmack, since the first trial. This stipulation was entered into in Washington and introduced in evidence in this case in its entirety. The stipulation is approved by Harry L. McNerney, Attorney for the Federal Works Agency. Mr. McNerney was called as a witness in this case by the plaintiff. He stated he was Special Assistant General Counsel for the Federal Works Agency, and assisted in preparing defendant's Exhibit A. Referring to the contents of Exhibit A and that Exhibit A *sets forth the basis upon which the selection of the site was made in this case* this witness testified:

"'*It is my understanding that the chronological statement given to Judge Kelso contained all of the important items* pertaining to the final selection of the *New Custom House and Court House and Post Office site* in Cape Girardeau; but the stipulation was prepared in first form by Judge Kelso and agreed to by Mr. Hasson representing the Department of Justice, and myself, based on what he had presented to us as embodying points he was to bring out, as were related in the chronological statement.

"The Court: *Were there material matters before the Department on which they based a decision, that are not in that agreed statement of facts or stipulation?*

"A. *Not to my knowledge.*

"The Court: Is it your knowledge from an examination of the files in the department with which you are connected that *this stipulation* that you entered into *covers material facts upon which the Department based its decision?* (Our emphasis here.)

"A. That is right.' (Emphasis added.)

"The Stipulation states that Mr. Deutsch was the only Site Agent to visit the city of Cape Girardeau for the purpose of making a recommendation to the Joint Committee considering selection of the Federal Building site. After detailing the manner of Mr. Deutsch making his investigation, the Stipulation recites that—

"'Post Office Inspector, M. J. Deutsch, recommended as his first choice a site other than the public property sought to be condemned in plaintiff's second amended petition.'

"The Stipulation sets forth the facts regarding the public use of the park site and the facts regarding the chain of title by virtue of which the site is now used as a public park, and the conditions contained in the deed of dedication to the inhabitants of the City.

"The Stipulation refers to the 'agreement for exchange of property' between the city and the plaintiff, and then states that—

"'*The agreement between the city officials of the city of Cape Girardeau and the United States of America for the exchange of the old Post Office Building and site for the property sought to be condemned*' (emphasis added) is based upon representations and claims by the city officials of the city of Cape Girardeau *that they had power to make the exchange.*

"The Stipulation concludes with this significant paragraph:

"'The said Joint Committee considering the selection of site for Post Office, Custom House and Federal Court Building at Cape Girardeau, Missouri, did, on April 7, 1941, *recommend the acceptance of the City's proposal which has been worked out as to form by the said H. S. Roome, Liaison Officer.*

"*The recommended acceptance* of the site sought to be condemned by the Joint Committee *was on the basis of an exchange of the present Federal Building and site thereof, and acceptance was made with the understanding that the United States Government would be permitted* to occupy

the present Federal Building and site at Cape Girardeau, Missouri, until after the proposed building had been completed and made ready for occupancy.

"*The acceptance was recommended by the Joint Committee with the agreement on the part of the City Officials of the City of Cape Girardeau, Missouri, that* the City would vacate the premises known as the Library Building, upon thirty days' notice from the United States Government, and thereafter remove the building within a reasonable time.' (Emphasis added.)

"We conclude from this record that the plaintiff concedes in this case that the selection of the site described in the petition, '*was on the basis of exchange of the present Federal Building and site thereof*' for the city park site described in the petition, *as the result of the agreement between the City Officials* and the plaintiff. In doing this did the Joint Committee base their act on a false premise, namely: a mistake of law; the law governing the right of the city to sell or exchange the whole or any part of the park site? 'Item VI' of the Agreed Statement of Facts reads as follows:

"'Item VI. Agreement to Exchange Property.'

That the City Officials of the City of Cape Girardeau, Missouri, represented to the Joint Committee considering the selection of site for Post Office, Custom House, and Federal Court Building at Cape Girardeau, Missouri, that said City Officials desired to negotiate with the United States Government for the exchange of the Court House Park, City Offices, Common Pleas Court House, and Public Library Building, in exchange for the Old United States Post Office Building located in said City of Cape Girardeau, Missouri;

"That said City Officials claimed and represented that they based their authority to sell or dispose property upon Section 7210 and 7211 of the Revised Statutes of Missouri, 1929; That the alleged agreement between the City Officials of the City of Cape Girardeau, Missouri, and the United States of America for the exchange of the Old Post Office Building and site for the property sought to be condemned *is based upon said representations* as to the right and

authority of the City Officials to sell or dispose property under said Section 7210 and 7211 of the Revised Statutes of Missouri 1929.' (Emphasis added.)

"The decision of the Court of Appeals in this case[1] states:

" 'The record shows without dispute that the property (described in the petition) has been devoted to public use, *not* alone *because the owners chose to do so, but* because they *were required by the deed of dedication so to do.* There was a *legal obligation* to *maintain the property* for the *designated public purpose.*' (Emphasis added.) (Our emphasis added.)

" 'This obligation rests upon the city officials. The lack of power on the part of the City to sell or exchange the property in question has been passed on by the Supreme Court of Missouri. See Board of Regents, et al. vs. Painter, 102 Mo. 464. The Supreme Court of Missouri was passing upon the right of the city to dispose of a parcel of the same land, described in the deed by which the park was conveyed and dedicated to Public use. In part, the Court said:

" 'This being so the city had *no right or power to convey* the lot to the plaintiff. It could no more convey the lot to plaintiff than it could the other parcel called a public square.' The 'public square' referred to in the Supreme Court opinion is land part of which is described in the petition. The use of the 'public square' for a Post Office and Federal Court Building, which would destroy the practical use of the public square, is as much a departure from the public use for which the property was dedicated, as in the case passed upon by the Supreme Court of Missouri. (Emphasis ours.)

"The City of Cape Girardeau being without legal right to sell or exchange any part of the park property and having a legal obligation to maintain the property for the designated public purpose set out in the instrument of conveyance, by virtue of which it now occupies the site, we *can not*

[1]Carmack vs. United States, 135 F. 2d 196, first appeal.

conclude other than that this proceeding was filed in aid of and had as its primary object the execution of the agreement made by the city officials to exchange the park property for the present Federal Building, and that the Joint Committee in designating the park site and in turn submitting its selection to the Postmaster General and Director of Federal Public Works, proceeded and acted under a mistake of law as to the right of the City to sell or exchange the land known as the City Park. Had the lawful rights of the city officials of Cape Girardeau been correctly understood by the Joint Committee (that they were without a legal right to sell or exchange the park property) the site would not have been selected, in the opinion of this Court. (Our emphasis.)

"Mr. Tucker, Architect for the Public Building Administration, sent to Cape Girardeau to investigate the park site, made this recommendation:

" 'If the city officials *can legally trade* their *publicly-owned Court House Park site for the present Post Office building and land,* I recommend it be accepted, *and if that is not legally possible, I then recommend the Post Office be sold to the city and land purchased in some other location for the new Federal building.*' (Emphasis added) (Our emphasis added.)

"We find in the Deutsch report a like statement as representing the judgment of the Postmaster at Cape Girardeau. *Nowhere in the record is there any mention of an intention to take the park site, except by agreement with the city.* (Emphasis ours.)

"There is *another point in the record that we think worthy of note,* from which it appears that the City Officials acted on a mistaken assumption—one of fact. *Defendant offered in evidence the deposition of Harlan Bartholomew. Mr. Bartholomew's business is civic engineer and city planner of wide experience, having taken* part in development of civic plans in over sixty American cities, including Washington, Pittsburgh, St. Louis, Los Angeles. Mr. Bartholomew was employed by the Chamber of Commerce of the city of Cape Girardeau to prepare a 'civic plan' for the city of Cape Girardeau. In part it will be found attached

to plaintiff's Exhibit 16. H. Arthur Tucker, in September of 1940, visited Cape Girardeau for the purpose of investigating 'conditions on and around the so-called Court house site, *which has been offered in exchange for the present owned Federal property*, for use as a site for the proposed Post Office and Court House Building.' Mr. Tucker's Report is United States Exhibit 16. This report contains this paragraph regarding the objective of the city officials of Cape Girardeau, with reference to the Bartholomew plan and the new Federal Building.

"'The above-mentioned city officials favored any scheme developed by the Government in locating this new Post Office and Court House *which would be in accordance with* and also which would expedite the commencement of proposed Civic Center.' (Emphasis added.)

"On this subject Mr. Tucker concludes as follows:

"'Because the proposed new Federal Building without doubt, will be the largest and most imposing building to be built in this Civic Center (referring to the Bartholomew plans) it seems obvious that it should be the building erected on the most prominent site of the plan. With the present city-owned park site therefor established as the most prominent feature or focus of the Civic Center, it leaves only the exact location of a building on that site to be determined.'

"On the other hand Mr. Bartholomew, originator of the Civic plan, testified on location of the new Federal Building on the Court House park, as follows:

"'I would say that it is unfortunate—most unfortunate.'

"*We believe the action of the Joint Committee, in the proceeding under a mistake of law, is decisive of this case adverse to the plaintiff, but we do not base our holding on that point alone.*" (Emphasis ours.)

(b) The opinion of the Circuit Court of Appeals (R. 655), 151 F(2d) 881, clearly states the chief issue involved in this case under the undisputed facts which are decisive of the case and which were overlooked by the court in its decision. The matters which were overlooked by the court

were duly submitted by the respondent. In referring to the issues and the undisputed facts of this case, which this court overlooked in deciding the case, the Circuit Court of Appeals (R. 655, 657. 151 F(2d) 881, 882) said:

"The District Court found on substantial evidence that the taking by the Government of that part of the park sought to be condemned *would result in the destruction of the use of the remainder of the tract as a park;* would require the wrecking of the common pleas court building and the removal of the public library building and a public monument; and would materially interfere with the proceedings of the court of common pleas and with the transaction of city business in the courthouse building, and also with the plans for a civic center prepared by an expert employed by the local chamber of commerce for that purpose. The court also found that there was no necessity for the taking of the land described in the petition for condemnation; that other sites in the City of Cape Girardeau were available for the proposed Federal project; that the failure to secure the land in this proceeding would not result in the failure of the Federal project; *and that the park was not selected by the Federal Works Administration and the Postmaster General as a site for the Federal building upon considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated.* (Emphasis ours.)

"We cannot say that any of *these findings of fact* by the District Court are clearly erroneous. On the contrary, *each of them was, in our opinion, required by the evidence.* *****. (Emphasis ours.)

"The evidence also established that, prior to the institution of the condemnation proceedings, certain agents of the Public Works Administrator and officers of Cape Girardeau had conceived the idea of an exchange of the park property for the present Federal building and the land on which it is situated, and that negotiations between them to that end had culminated in the proposed agreement between them for

the *exchange of property*. As stated above, this proposed agreement was *the moving cause* for the selection of the park as the site for the Federal building. When it developed that the City of Cape Girardeau was not only without power but was prohibited by Missouri law from carrying out the proposed contract and thus violating the trust under which it held the park property, the present proceedings for condemnation of the site were instituted *as a means for accomplishing indirectly an exchange of properties which* could not be directly made. *This exchange* was to be consummated eventually by the acceptance by Cape Girardeau of the present Federal building and the land on which it is situated in payment for any award against the United States in the condemnation proceedings. The facts set out above are sufficient, we think, to distinguish this case from C. M. Patten & Co. v. United States, 9 Cir., 61 F. 2d 920; United States v. Certain Parcels of Land, D. C., 30 F. Supp. 372, and like decisions.

"******* We think it may not be said that Congress in conferring upon certain administrative officials of the Government power to select cities and sites in cities to be used for the erection of buildings to be used by the United States for postoffices, courthouses, and customhouses, intended to authorize these officials to select as a site to be condemned for this purpose one not only occupied by a State or one of its political subdivisions for a governmental purpose of equal rank, *but also held in trust for the specific purpose for which the land was being devoted, with no power to authorize another or different use, and where the proposed taking by the United States would, as the District Court has found in this case, materially interfere with necessary local governmental functions.*" (Emphasis ours.)

(c) The above-quoted portions of the opinions of the courts below, stating the undisputed evidence which supports the conclusions reached by the lower courts and the contentions of respondent, would seem to render unnecessary the repetition of that evidence and argument in support of this point of respondent's petition for rehearing.

However, counsel deem it proper to call attention to the following propositions which were duly presented by re-

spondent in her brief and are supported by the evidence which shows that a trade of properties was to be effected, but that neither the government officials nor the citizens of Cape Girardeau knew that the public library building and site were to be involved in the proposed trade.

(1) Mr. Meyers, the Fourth Assistant Postmaster General, testified:

"Q. Do you know whether the original plan for the condemnation of a part of the park and courthouse contemplated the condemnation of the site of the Public Library Building?

A. My recollection is that it didn't contemplate the condemnation of the Public Library site" (R. 137) (Br. 6).

Louis Hecht, a prominent merchant on Main Street at Cape Girardeau, and the owner of some ten store buildings on Main Street, in referring to the condemnation of the Library site and building, testified, in part, as follows:

"Q. When did you first learn from any source that the Public Library Building was included in this condemnation?

A. When I first learned that the library is included in the condemnation proceedings?

Q. Yes, sir.

A. I never knew that the library was included. I have always been under the impression that if the postoffice is located where the courthouse is now that it would not affect the library, that the library would not be affected in any way, it would be left as it is" (R. 249).

(2) The record in this case shows that the citizens of Cape Girardeau were in large numbers opposed to the proposed trade even though they were not informed that the library building was to be included.

In the Report and Recommendations of *M. J. Deutsch*, the Government's only Site Agent (R. 167-204), it is stated:

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. The President of

the Chamber of Commerce decided not to give an opinion as to his preference."

The record shows that 5,755 votes were cast at the general Municipal Election held April 2, 1940.

And the court, referring to the referendum petition signed by the citizens of Cape Girardeau, protesting against an exchange of properties, said "it was agreed by Counsel it was signed by 2200 people, subject to correction" (R. 466). The Court further said: "We note there was offered in evidence the proceeding leading up to and the holding of an election on the park site. The evidence is of little value to the issues. Only one site was submitted to the voters and that was presented as a question of the city making the trade discussed heretofore. Such procedure could not give legal effect to a transaction the city was powerless to perform" (R. 616).

The files of City of Cape Girardeau relating to ordinances and contracts for the exchange of property were not open to the public. Relating to this matter (R. 451), Mr. Kaempfer, the City Clerk, testified that since this proceeding to exchange property, or this ordinance, to exchange property down to that time, none of the papers relating to this condemnation suit or the exchange of the property, was to be found in his office. They are all in the hands of the City Attorney, in his files. One of the attorneys for the defendant Carmack repeatedly urged him to get the files so they would be available in the preparation of this case, but he didn't have the files, and they had not been back in his custody.

(3) The court has overlooked the evident fact that the citizens of Cape Girardeau who might have indicated their approval of the proposed exchange of properties were not informed and did not know that the city officials had no right or authority to trade the land occupied by the courthouse and library and used as a public park, which lack of power and authority is clearly stated in Ark-Mo Power Co. v. City of Kennett, Mo., 78 F. (2d) 911, and Board of Regents for Normal School District No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, which are cited and discussed in respondent's brief (Br. 50, 51).

(4) The court has also overlooked the evident fact that the citizens of Cape Girardeau who may have indicated approval of the proposed trade of properties were not advised and did not know that the government's agents did not have authority under the Acts of Congress to trade the present postoffice building and site for the land occupied by the courthouse of the State of Missouri and the public library established and maintained by the citizens of Cape Girardeau. This proposition was duly presented by respondent in her brief (Br. 55) as follows:

"It is apparent from the facts in the Record now under consideration that the Government is not authorized by Section 341 or Section 345b of Title 40 U. S. C., or any other statute to exchange the present Post Office Building and site at Cape Girardeau for the land described in the Condemnation Petition already devoted to public use.

There is no claim by petitioner that the government-owned building and site has been supplanted by a new structure, or that the Secretary of the Treasury has determined there is no further federal need for the present government-owned building and site.

Section 345b, Title 40, provides the only method for disposing of existing federal buildings and it applies only in cases where existing buildings have been supplanted by new structures.

The alleged agreement for such an exchange of property is unauthorized, illegal and void and cannot be effectuated under the guise of a condemnation suit.

Furthermore, it is evident that in the selection of the site in this case, the administrative agents gave no consideration "to the interest and convenience of the public," as required by Section 254, Title 40, U.S. Code."

The facts in this record above referred to under this point and the Federal statutes cited are decisive of the issue adverse to petitioner. All of said matters hereinabove referred to were overlooked by the court in deciding this cause and were duly presented by respondent.

(5) The record in this proceeding shows that petitioner held a deed from the City to the site described in the petition prior to and at the time of the institution of these proceedings.

The letter from Attorney General to the U. S. Attorney directing commencement of this proceeding (R. 91, 92), clearly shows that this proceeding was not intended to be instituted, and was not instituted, as a proceeding in condemnation under any statute or law authorizing the acquisition of property under the circumstances and facts disclosed by the record but was instituted in an attempt to effect an exchange of properties prohibited by law. The Attorney General under date of October 16, 1941, to the U. S. Attorney in St. Louis, Mo., said:

"There are transmitted herewith a certified copy of a letter dated September 25, 1941, in which the Acting Administrator of the Federal Works Agency requests the institution of a proceeding to condemn land for a post office and custom house site at Cape Girardeau, Missouri, *a deed from the City of Cape Girardeau*, Missouri, purporting to convey title to the land to the United States, ***." (R. 91)

"It is contemplated that compensation for the taking of the land shall be made by conveyance of the present federal building to the City of Cape Girardeau, ***. After judicial determination of the just compensation in the proceeding, *a deed conveying the present federal building site to the city will be obtained and forwarded to you.*" (R. 92, 93) (Emphasis ours)

Letter of John N. Edy, Acting Administrator to the Attorney General, under date of September 25, 1941, requested institution of this suit to effect the illegal contract with city of Cape Girardeau (R. 58). The first clause of said letter to the Attorney General after reciting the statutes applicable to condemnation proceedings contains this significant statement regarding the reason for the institution of this proceeding, to-wit:

"*Under authority of the above cited legislation this Agency entered into a contract with the City of Cape Girardeau, Missouri, for the exchange of the present Fed-*

eral building and site, hereinafter described, for a tract of land as a new Post Office and Custom House site also hereinafter described." (Emphasis ours)

The stipulation of Agreed Facts, Item VI, Agreement to Exchange Property (R. 162) Resp. Bf. App. p. 7a) entered into on November 9th, 1943, after the first decision of the Circuit Court of Appeals on April 26th, 1943, by the United States of America and the respondent, shows that there was an agreement between the city officials and the United States for the exchange of the old post office building and site for the property described as the Court House Park, the alleged agreement to exchange properties being based upon Sections 7210 and 7211, Revised Statutes of Missouri, 1929, which statutes do not give the city officials the authority they represented that they had.

II.

And for further ground for rehearing the respondent says that the court overlooked the following points which were duly presented by respondent and which are decisive of this case.

(a) The consent of the State of Missouri to the acquisition by the United States of this land for the purpose of establishing and maintaining a custom-house and court house has not been given and such consent is necessary and jurisdictional.

Prior to 1929 the laws of Missouri gave consent of the State to the purchase by the United States of land situated in any of the towns or cities of this state not exceeding one acre in quantity in any one lot or parcel on which to erect buildings for the accommodation of United States Courts, customhouses and postoffices. The practice has been to grant the consent of the state by an act of the legislature naming the town and the amount of ground to be selected. To illustrate, the law authorized the acquisition of a site at Hannibal as follows: "The consent of the State of Missouri is hereby given to the purchase by the United States of one or more pieces of land situated in the city of Han-

nibal and in any city or town in this state, not exceeding five acres in quantity, on which to erect a building for the accommodation of the U. S. Court, Postoffice * * * " (R. S. 1909, Sec. 7928).

In 1929 (Laws of Missouri 1929, p. 129) the legislature of Missouri repealed the statutes authorizing the acquisition of property by the United States for the purpose of establishing custom houses and United States courts. From 1929 until the commencement of this proceeding the law of Missouri (now Sec. 12691, Revised Statutes of Missouri 1939) governing this proceeding reads as follows:

"*Section 12691. Consent of state given United States to acquire Missouri land for certain purposes.*—The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

Under the law of Missouri since 1929 down to the date of commencement of this proceeding the United States Government had no authority to acquire by purchase or grant land for the purpose of establishing and maintaining court buildings or custom houses, as it claims in this proceeding and as it attempted to do by omitting from its amended petition the allegation that the site sought to be acquired was to be for a court house and custom house.

(b) Pleadings involved in this proceeding relating to acquisition of property by the United States in the state of Missouri, show that the proceeding is in conflict with the Constitution of the United States and the Laws of Missouri.

Original Petition (R. 5, Clause fourth) reads as follows: "Fourth: The land sought to be condemned herein has

been duly selected as the new *Post Office and Custom House and Court House site.* * * *"

The Answer to Original Petition (R. 473, 474), in the second paragraph, reads as follows: "Further answering this defendant says that the Legislature of the State of Missouri has not given its consent to the condemnation of said property for the purposes stated in plaintiff's petition or for any other purpose as is required by law when public property is sought to be condemned for other public purposes."

While it is clear that the United States government has had no authority to acquire by purchase or grant any land in this state for the purpose of establishing and maintaining customhouses and courthouses since 1929, yet the statutes above referred to were not made the basis of the decision of the lower courts. The chief issue in this cause which was overlooked by this court is the issue expressly decided by the Circuit Court of Appeals when it held that "* * * the present proceedings for condemnation of the site were instituted as a means for accomplishing an exchange of properties which could not be directly made * * *" and that "* * * the park was not selected by the Federal Works Administrator and the Postmaster General as a site for the Federal building upon considerations of Federal necessity or advantage, but because of the erroneous belief of these Federal agents that the City of Cape Girardeau had authority to exchange the park site, together with the buildings thereon, for the present Federal building in Cape Girardeau and the land on which it is situated."

III.

And for further ground for rehearing, the respondent says that she is entitled to a reconsideration of this cause for the reason that in deciding said cause the court overlooked the following points which are decisive of this cause adverse to the petitioner and which were duly submitted by counsel for respondent.

(a) The petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, does not challenge the findings of facts and decisions thereon adverse to petitioner. In support of the above petition respondent submits that petitioner is limited to the questions presented on petition for writ of certiorari to the Circuit Court of Appeals. Upon the record in this proceeding the following conceded facts which were overlooked in deciding this cause are decisive of the issues in this case adversely to petitioner.

(1) The letter of the Attorney General to the U. S. Attorney at St. Louis states: "You are advised that the Solicitor General has decided that application should not be made for a writ of certiorari." (R. 94)

That letter shows that the Attorney General based his request for the filing of the amended petition in this proceeding upon one issue, namely, the obtaining of a judicial review of the asserted capricious or arbitrary action of the officer who selected the park site.

The petitioner accepted the findings of facts and the decision of the Circuit Court of Appeals holding that "The record shows without dispute that the property has been devoted to public use, not alone because the owners chose to do so, but because they were required by the deed of dedication so to do. There was a legal obligation to maintain the property for the designated public purpose." (Carmack v. United States, 135 F2d 196, l. c. 199).

By reason of the failure of petitioner to make application for a writ of certiorari (R. 94), the petitioner accepted that as the law appplicable to this proceeding.

(2) This court in deciding this case has overlooked the decisive fact, as held by the Circuit Court of Appeals, that joint action by the Federal Works Administrator and the Postmaster General was necessary to the institution of these proceedings.

The Court of Appeals held: "Before the Administrator of the Federal Works Agency had authority under the law to direct the institution of this proceeding, the selection of the site and the designation of the town for the erection of a post office building must first have been determined by the

joint action of the Postmaster General and the Administrator of Federal Works Agency. This, we think, was jurisdictional, and there is neither allegation nor proof of the required joint action. As this question goes to the jurisdiction of the court to hear and determine the condemnation proceeding and it appears on the face of the record, we must notice it even though, as contended by counsel for appellee, the question had not been timely presented in the trial court." (Carmack v. United States, 135 F2d 196, l. c. 201.)

The joint action of the Federal Works Administrator and the Postmaster General (petitioner's exhibit 4) was not in compliance with the law requiring such action to be taken prior to the institution of the proceeding. There is nothing in the record to show that either the Federal Works Administrator or the Postmaster General did anything other than to merely sign the paper showing joint selection in 1943. There is no evidence to show that the certificate of selection was made as required by statute prior to the institution of this proceeding but on the contrary it clearly appears that the record does show that it was a certificate of selection as of that date in 1943 and not evidence of a joint selection made prior to the institution of proceeding as required by statute, which the court held to be, and which was, a jurisdiction requirement.

(3) The petitioner ignored and the court, in deciding this case, overlooked the undisputed facts contained in the report of M. J. Deutsch the government's only site agent.

In referring to the Deutsch report, the Circuit Court of Appeals said:

"Without quoting the Deutsch Report in full, in part it refers to the "Disadvantages" of the Park site here in issue as follows: 'This location is somewhat removed from the center of carrier delivery and the center of population, and is definitely not in the trend of future business expansion or growth. A new building here would face a side street with only fair residential property on the opposite side. In order to take advantage of symmetrical attractiveness with respect to surrounding streets, views, and buildings, it may

be necessary to forego advantages, with respect to necessary approaches and drive-ways." (R. 604)

The Deutsch Report recommending the "First Choice," which the court overlooked, reads as follows: "This is an excellent corner location facing the most prominent intersection in the city and on the principal business street. The center of the business section is not definitely ascertainable because of the diversion caused by the three business sections, but this corner is generally regarded as being the center of the business district. This location is about two blocks north and three blocks east of what might be designated as the center of delivery and the approximate center of population. *** Regardless of the fact that the trend of the business district is toward the west on Broadway, this would remain the principal and the most prominent intersection because of the character of the buildings now standing."

The District Court found that: "The reason for the 'Joint Committee' rejecting the recommendation of their site agent appears first in the Deutsch Report: 'An important advantage is that the exchange herein provided for (of Park site from the city for the present Federal Building) will allow the Government to dispose of the present federal building and site to a mutual advantage. No other acceptable offer for an exchange or sale of the present government property is securable.'" (R. 606)

The Deutsch report ignored by petitioner and overlooked by the Court in this proceeding closes with this recommendation: "First Choice: *** This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would present an advantageous or desirable transaction."

For second choice the site agent said: "I have selected Site No. 1, the city owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. *** The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled

by friendly condemnation proceedings as the city officials are willing and desirous for the trade."

Wherefore, the respondent, by reason of the grounds stated in this petition for rehearing, is entitled to a reconsideration of this cause and respectfully asks that the court will so order.

Respectfully submitted,

HOMER HALL,
ROBERT D. ABBOTT,
I. R. KELSO,
L. LEE BOWMAN,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

We, the undersigned counsel for respondent, state that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated in St. Louis, Missouri on January 16, 1947.

Signed:

Homer Hall,

Robert D. Abbott,

I. R. Kelso.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1946.

United States of America, Petitioner, v. Iska W. Carmack.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 9, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This proceeding was instituted by the United States to condemn land as a site for a post office and customhouse in the City of Cape Girardeau, Missouri, in reliance upon several federal statutes, including the general Condemnation Act of August 1, 1888, and the Public Buildings Act of May 25, 1926.[1] The City and site were selected by the Federal Works Administrator and the Postmaster General acting

[1] ". . . , in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, ..." Sec. 1, Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. § 257.

"To enable the Federal Works Administrator to provide suitable accommodations . . . for courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Federal Works Agency in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, . . . *Provided*, That . . . insofar as relates to buildings to be used in whole or in part for post office purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: . . . ." 40 U. S. C. § 341. This is codified from § 1 of the

jointly under the Public Buildings Act. The principal issue is: Was the Federal Works Administrator authorized by the foregoing statutes to acquire by condemnation land held in trust and used by the City for such public purposes as those of a local park, courthouse, city hall and public library?

In 1941, the United States petitioned the United States District Court for the Eastern District of Missouri to condemn as a site for a United States post office and customhouse about one and one-half acres, near the center of the City of Cape Girardeau, together with the improvements thereon except a public library building. This site was part of a four acre public park and the improvements to be condemned included a building used as the county courthouse and city hall, a memorial fountain, a small memorial monument and a portion of a bandstand. The library building apparently was to be removed by its owners on 30 days' notice from the United States.

The petition included as parties defendant the City and County, numerous officials, and all known and unknown heirs or others who might claim an interest in this site especially through those who conveyed it, in trust, in 1807 to the Commissioners of the District or, in trust, in 1820 to the inhabitants of the Town of Cape Girardeau. Respondent was the only defendant to file an answer. Finding that she had no interest permitting her to maintain the

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Public Buildings Act of May 25, 1926, 44 Stat. 630–631, as modified by Reorganization Plan I, §§ 301–303, 53 Stat. 1426–1427, 5 U. S. C. following § 133t. See also, 40 U. S. C. §§ 342–350 and the balance of the original Act.

The petition likewise relied upon the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. §§ 258a–258e; Third Deficiency Appropriation Act, fiscal year 1937, 50 Stat. 755, 773; Federal Public Buildings Appropriation Act of 1938, 52 Stat. 818; and the Reorganization Act of 1939, 53 Stat. 561, 5 U. S. C. § 133, *et seq.*, under which Reorganization Plan I was submitted to Congress and made effective July 1, 1939, 53 Stat. 813, 5 U. S. C. § 133s.

defenses she asserted, the District Court entered a preliminary decree in favor of the United States. On respondent's appeal the Circuit Court of Appeals remanded the cause for further proceedings consistent with its opinion holding that the respondent had a special interest entitling her to object to the property being taken for a purpose destructive of the public use to which it had been dedicated by her ancestors. *Carmack* v. *United States*, 135 F. 2d 196.

In 1944, on retrial before a different judge, the District Court recognized the respondent as entitled to contest the condemnation and, at the direction of the Circuit Court of Appeals, heard evidence as to whether or not the officials of the United States acted capriciously and arbitrarily in selecting this site. It held that "the selection of the site described in the petition, under all the facts referred to, amounts in law to an arbitrary and unnecessary act" and dismissed the petition. *United States* v. *Certain Land, Etc.*, 55 F. Supp. 555, 564. The Circuit Court of Appeals affirmed the judgment on the ground that the Federal Works Administrator and the Postmaster General did not have sufficient statutory authority "to take the particular land sought to be condemned." It then expressly found it unnecessary to consider whether or not the federal officials had acted "capriciously and arbitrarily." *United States* v. *Carmack*, 151 F. 2d 881, 882. Because of the importance of the construction of the statutes authorizing the condemnation of land for federal uses, we granted certiorari. — U. S. —.[2]

[2] The right of the respondent to contest the condemnation turns upon the effect of the deeds, executed by certain of her ancestors in 1807 and 1820, pursuant to which this site long has been put to local public use. Her interest, turning largely on Missouri law, was upheld by the Circuit Court of Appeals, following the first trial, *Carmack* v. *United States*, 135 F. 2d 196, and, as we do not have to question that interest in order to reach our decision, we do not reexamine it. *Bd. of*

Both the general Condemnation Act and the Public Buildings Act [3] expressly authorized the acquisition of land by the United States by condemnation as a site for a United States post office, customhouse or courthouse. Neither Act expressly named the City or designated the site to be condemned in this case. Neither expressly stated whether or not sites already in use for conflicting federal, state or local public purposes were subject to condemnation. The Condemnation Act supplemented the federal right "to procure real estate for the erection of a public building or for other public uses," by adding to it a general federal power of condemnation under judicial process to be exercised by an officer of the Government "whenever in his opinion it is necessary or advantageous to the Government to do so." The Public Buildings Act, as an incident to an original $150,000,000 program, gave authority and direction to the Secretary of the Treasury (later substituting the Federal Works Administrator) "to acquire, by purchase, condemnation, or otherwise, such sites . . . as he may deem necessary, ..." It specified that as to "buildings to be used in whole or in part for post office purposes, the Federal Works Administrator, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: . . . ." [4] These Acts were natural means for Congress to adopt in putting its constitutional powers into use on a scale commensurate with the size of the nation and the need of the time. Neither Act imposed

Regents, Normal School Dist. No. 3 v. *Painter*, 102 Mo. 464, 14 S. W. 938; *Mott* v. *Morris*, 249 Mo. 137, 155 S. W. 434; and 25 Stat. 357, 40 U. S. C. § 258. The proceeding to condemn the land being *in rem*, the jurisdiction of the court does not turn upon her participation in the case. Cf. *United States* v. *Dunnington*, 146 U. S. 338, 352; *In re Condemnation Suits by United States*, 234 F. 443, 445.

[3] See note 1, *supra*.

[4] For the three foregoing quotations, see note 1, *supra*.

expressly any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions.[5] Far removed from the time and circumstances that led to the enactment of these statutes in 1888 and 1926, this Court must be slow to read into them today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely

The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. The Fifth Amendment, in turn, provides him with important protection against abuse of the power of eminent domain by the Federal Government.[6]

While in its early days the Federal Government filed its condemnation cases in the state courts, this Court, in *Kohl v. United States*, 91 U. S. 367, disposed of the idea that this was necessary. In that case, which has become the leading case on the federal power of eminent domain, Mr. Justice Strong also said:

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[5] Nothing has been found in the legislative history of these Acts to indicate that Congress intended to give its agents less than the fullest possible authority of Congress in selecting cities and sites. See H. R. Rep. No. 132, especially minority views at pp. 6–7, 10, and H. R. Rep. No. 1223, 69th Cong., 1st Sess.; S. Rep. No. 197, 69th Cong., 1st Sess.; 67 Cong. Rec. 4023–4028, 8356–8357, 8359, 8494, 8567.

[6] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const. Amend. V.

"It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, *or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed.* The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, *or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.* No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. . . . But *it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and com-*

plete as is the power of the States over the subjects to which their sovereignty extends. . . .

"If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." (Italics supplied.) *Kohl* v. *United States, supra*, 371–372, 374.

The *Kohl* case approved the condemnation of privately owned land, then subject to a perpetual leasehold, for a post office site in Cincinnati, Ohio, under an Act of Congress expressly naming that City but not expressly naming the site. The respondent here seeks, by judicial interpretation of the general Condemnation Act and the Public Buildings Act, to exclude from condemnation a particular site in Cape Girardeau selected for a post office by the appropriate federal officials. She depends upon the fact that the site already is being used by a governmental subdivision of Missouri for other public purposes impressed upon it by its private owners over a century ago. The principle of federal supremacy, so well expressed in the *Kohl* case, argues against such a subordination of the decisions of federal representatives to those of individual grantors or local officials as to the means of carrying out an admittedly federal governmental function.[7]

It makes little difference that the site here sought to be condemned is held by the City in trust instead of in fee. The city government is not resisting the condemnation. The Federal Government can obtain, by voluntary conveyance, whatever title the City can convey. The weakness in the City's right to sell or exchange this site arises from restrictions in the conveyance to it. Through the

[7] See also, *Hanson Co.* v. *United States*, 261 U. S. 581, 587, for emphasis on the all-inclusiveness of the general Condemnation Act of August 1, 1888.

inclusion, as defendants, of all claimants who might rely upon such restrictions or might claim an interest through the grantors of this site, a decree of condemnation will dispose of the suggested defects. By giving notice to all claimants to a disputed title, condemnation proceedings provide a judicial process for securing better title against all the world than may be obtained by voluntary conveyance.

Both in themselves and from the relation of these Acts to the Constitution, we find substantial reason for making their broad language effective to its full constitutional limit. While the federal power of eminent domain is limited to taking property for federal public uses, the question of the existence of a federal public use presents no difficulty here because the constitutional power of Congress to establish post offices is express.[8]

The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land[9] make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, be equally supreme. Mr. Justice Bradley stated this principle clearly, while on circuit, in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19:

> "The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should

[8] U. S. Const. Art. I, § 8, Cls. 7 and 18.
[9] U. S. Const. Art. VI.

have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes." [10]

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[10] An appeal in *Stockton* v. *Baltimore & N. Y. R. Co.*, *supra*, was dismissed in this Court, 140 U. S. 699, and, in the meantime, Mr. Justice Bradley's statement was quoted with approval in *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 641, 656. See also, *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 681; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529–530.

When Congress has wished to subordinate its selection of state lands to state approval it has done so by express provision. In the Weeks Forestry Act of March 1, 1911, 36 Stat. 961, 962; 43 Stat. 1215; 45 Stat. 1010; 48 Stat. 955; 16 U. S. C. § 516, and the Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 1223; 16 U. S. C. § 715f, the consent of the state legislature to the federal acquisition of land is made an express condition of the acceptance of such land. Such consent does not deprive the state of civil or criminal jurisdiction over the land. 36 Stat. 963, 16 U. S. C. § 480, and 45 Stat. 1224, 16 U. S. C. § 715g. See also, The Upper Mississippi River Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650, 16 U. S. C. § 724.

The acquisition of federal legislative jurisdiction, as distinguished from federal title to the land, is a different matter. If the Federal Government desires exclusive legislative jurisdiction over land acquired by it, the Constitution indicates that the consent of the state in which the land is located is necessary. Art. I, § 8, Cl. 17, provides that "The Congress shall have Power . . . To exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . ." See *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 18, appeal dismissed, 140 U. S. 699. See also, Joint Resolution of September 11, 1841, 5 Stat. 468, and Rev. Stat. § 355, which formerly required the consent of state legislatures to federal purchases of certain sites as a condition of expending federal funds to pay for them. Since February 1, 1940, such consent has not been required except where

The Fifth Amendment to the Constitution says "nor shall private property be taken for public use, without just compensation." This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.[11] It imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate it. Accordingly, when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned.[12]

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the United States has sought "exclusive or partial" legislative jurisdiction. Unless and until the United States accepts such jurisdiction over lands acquired since February 1, 1940, it is presumed conclusively that no such jurisdiction has been accepted. 54 Stat. 19; 54 Stat. 1083; 40 U. S. C. § 255. The exercise of exclusive legislative jurisdiction is not an issue in this case and, in any event, Missouri has consented to it. "The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, . . ." Mo. R. S. A. (1939), § 12691.

[11] See *United States* v. *Cooper*, 20 D. C. 104, 116, affirmed sub nom., *Shoemaker* v. *United States*, 147 U. S. 282; *In re Rugheimer*, 36 F. 369, 371.

[12] When, however, a sovereign state transfers its own public property from one governmental use to another, or when the Federal Government takes property from state ownership merely so as to put it to a federal public use for which the state already holds it in trust, a like obligation does not arise to pay just compensation for it. See *In re Certain Land in Lawrence*, 119 F. 453; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 19, appeal dismissed, 140 U. S. 699.

The foregoing establishes the principle of the supremacy of a federal public use over all other uses in a clearly designated field such as that of establishing post offices. The Government here contends that the officials designated by Congress have been authorized by Congress to use their best judgment in selecting post office sites. It contends also that if the officials so designated have used such judgment, in good faith, in selecting the proposed park site in spite of its conflicting local public uses, the Federal Works Administrator has express authority to direct the condemnation of that site. We agree with those contentions. We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected. The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits. It was within the legislative power of Congress to choose or reject this site by direct action. It would have been within its legislative power to exclude from the consideration of its representatives this or other sites, the selection of which might interfere with local governmental functions. Such an exclusion would have been an act of legislative policy. We find no such express or necessarily implied exclusion in the broad language of these Acts.[13]

[13] In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed

In this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so "capriciously and arbitrarily" that their action was without adequate determining principle or was unreasoned.[14] The record presents no such issue here. The procedure followed in making the selection of the site showed extraordinary effort to arrive at a fair and reasoned conclusion.[15] The site inspector, in his original

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or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority. See *United States* v. *Jotham Bixby Co.*, 55 F. 2d 317, 319, affirmed sub nom., *C. M. Patten & Co.* v. *United States*, 61 F. 2d 970, decree vacated as moot, 289 U. S. 705; *In re Condemnations for Improvement of Rouge River*, 266 F. 105; *United States* v. *City of Tiffin*, 190 F. 279, 281.

[14] "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1. . . .; without adequate determining principle; . . ." and by Webster's New International Dictionary, 2d Ed. (1945), as "2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned; . . . ."

"Capricious" is defined by Webster's New International Dictionary, 2d Ed. (1945), as "2. . . .; apt to change suddenly; freakish; whimsical; humorsome." Cf. *Fox Film Corp.* v. *Trumbull*, 7 F. 2d 715, 727; *Puget Sound Power & L. Co.* v. *Public Utility Dist. No. 1*, 123 F. 2d 286, 290, cert. denied, 315 U. S. 814; *United States* v. *Eighty Acres of Land*, 26 F. Supp. 315, 319.

See also, *United States* v. *Certain Parcels of Land*, 30 F. Supp. 372, 379; *United States* v. *Parcel of Land*, 32 F. Supp. 718, 721.

[15] It apparently followed regulations of the Federal Works Agency and Post Office Department as authorized by 5 U. S. C. §§ 22, 369; 40 U. S. C. §§ 341, 347. Among its principal steps were the following: June 12, 1940, approval of the general project for Cape Girardeau by Federal Works Administrator and Acting Postmaster General based upon the recommendation of the Commissioner of Public Buildings and the Fourth Assistant Postmaster General; July 23–26, 29–31, 1940, Post Office Inspector and Site Agent visited Cape Girardeau; August

report, recommended the park site as his second choice and demonstrated the reasonableness of a choice, by his

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20, 1940, he submitted his recommendations, showing that he inspected 22 proposals, eliminated all but 6 on general grounds, carefully considered the remainder and submitted full report on 3. His first choice was to enlarge the present post office site; his second, to acquire the site here in controversy; his third, to acquire a site between the two. Further studies were made in Cape Girardeau or in Washington by the Associate Architect for the Federal Works Agency, the Fiscal Manager of the Public Buildings Administration and the Superintendent of the Division of Post Office Quarters in the Post Office Department. All wishing to be heard were heard. February 11, 1941, the City Council passed an ordinance proposing an exchange of the park site for the present post office site and submitting this proposal to a special election. March 4, 1941, a majority of those voting in 8 of the 10 wards approved the exchange, the city wide vote being 1612 to 1344. May 26, 1941, the Acting Commissioner of Public Buildings notified the Mayor of the Government's acceptance of the proposed exchange. September 25, 1941, the Acting Administrator of the Federal Works Agency advised the Attorney General that, under authority of the Public Buildings Act, the Agency had contracted for the exchange. After referring to his failure to secure title by voluntary conveyance from the City in spite of the willingness of the City officials to make the exchange if they had legal authority to do so, he asked the Attorney General to file this condemnation proceeding. It was done November 22, 1941. In accordance with the opinion of the Circuit Court of Appeals after the first trial, the Government, on June 10, 1943, secured evidence of a formal joint action, signed personally by the Federal Works Administrator and the Postmaster General, expressly selecting the site in suit. This was included in the record of the second trial. The actions of June 12, 1940, and June 10, 1943, refer to the project as one for a post office and courthouse, whereas the petition for condemnation refers to it as one for a post office and customhouse. This variation was not pressed in the litigation and is not material to the main issue of statutory construction.

The foregoing narration of the steps taken in this instance is not intended as an indication that all or any of them are essential to the exercise of the statutory authority to select sites in other cases. They are set forth to help demonstrate that, in the face of them, the selection here cannot be classed as "capricious and arbitrary," under any appropriate definition of those words.

superiors, of either of his first two selections.[16] His estimate of divided community sentiment, with apparent community preference for the park site, indicates the absence of capriciousness and arbitrariness in the Government's final selection of the park site.[17] The popular

[16] "For First Choice I recommend that the present government-owned site be retained and that the adjoining property, Site 2 offered by H. Bermermann be purchased for $15,000, and that a counter offer be made to the owner of Site 3, Ella M. Drum to purchase this site for $600.

"This recommendation is made because it is believed that the present location is the most outstanding site in this city, and because of the numerous limitations on all of the other competing sites which would prevent an advantageous or desirable transaction.

"For Second Choice I have selected Site No. 1, the city-owned park, which could be developed into an attractive setting for the new building, and which could no doubt be secured in an exchange resulting in mutual benefit to the city and Government. The bid submitted by the City is not intended to be a final offer, and it is expected that after a review of the facts by the Site Committee a counter-offer could be made with respect to a definite area of about 175' x 215' within the park grounds and with respect to improvements in surrounding approaches, removal of trees and fountain, and demolition of present city building. The mayor and city council verbally agreed to favor any reasonable counter-offer to be made by the Government. It is my opinion that the government-owned site is valued at approximately $225 per front foot, whereas the park site has a value of about $100 per front foot, and this must be taken into consideration in submitting a counter-offer. The question of the City Council's authority to make an exchange of this property is in dispute, but this could no doubt be settled by friendly condemnation proceedings, as the city officials are willing and desirous for the trade."

[17] ". . . the city park property, is actively favored by the City Council, and almost unanimously favored by the business men on Main Street. . . .

"Because of the divergence of opinion, the Chamber of Commerce in a recent meeting decided not to make any official comment as to a certain location. . . .

"The postmaster, who has no financial or personal interest in any of the locations, but who is conscientiously interested in civic development, regards the government-owned site as an outstanding location

referendum vote of 1612 to 1344 in favor of the transfer of the park site by the City to the Federal Government, in exchange for the Government's transfer of its present post office site to the City, confirms his estimate. These federal officials had the right, if not the obligation, to consider at this time the necessity of disposing of the present post office site and of the single purpose governmental building thereon. That issue inevitably would confront the Government at some time if a new site were chosen. The opportunity to exchange or sell the present site to the City in connection with the acquisition of the park site for a new post office was, therefore, a reasonable rather than a capricious consideration.

On the present record, the petitioner was entitled to a preliminary judgment of condemnation. The finding of the District Court on the second trial that the selection of the park site "amounts in law to an arbitrary and unnecessary act" appears, from the context, to have been a finding largely of the comparative undesirability and lack of necessity for the selection of that site and not to have been a finding that the selection had been made without adequate determining principle and without reason.[18]

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but recommends the city park as first choice because this trade would allow the city to retain a good improvement and allow the Federal Government to secure a site with attractive surroundings."

[18] The District Court said:

"The right of plaintiff to condemn the land must stand or fall on the determination by this court of the question, Did the Acting Administrator of Federal Works Agency and the Postmaster General, under the circumstances here presented, act arbitrarily and capriciously in selecting the site—*was the act necessary?* The term 'arbitrarily and capriciously' has been defined to mean an act done 'without adequate determining principle; not founded in the nature of things; not done or acting according to reason or judgment'; *an unnecessary act.* . . .

"That this action was taken by the Joint Committee, with information in their possession with respect to availability of other sites

The comparative desirability and necessity for the site were matters for legislative or administrative determination rather than for a judicial finding.[19] Even if the word "arbitrary", as used by the District Court, was intended by it to have the ordinary meaning which that word has when used alone, we are unable to conclude on the record before us that the selection of the park site for a post office in Cape Girardeau was, as a matter of law, capricious and arbitrary in any sense that, under any construction of the Acts before us, would invalidate the selection here made.

The judgment of the Circuit Court of Appeals, therefore, is reversed and the cause remanded to the District Court for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS concurs in the result and substantially agrees with the opinion of the Court. But he reserves judgment as to the circumstances under which authority to condemn land owned by a city or a state should be inferred from a general condemnation statute, if the local government challenged the taking.

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which shows unquestionably that the action of the plaintiff is *unnecessary and the site selected is not now, nor was it when selected, the most desirable and available.*" (Italics supplied.) *United States* v. *Certain Land, Etc.*, 55 F. Supp. 555, 557, 563.

[19] *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708–710; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Sears* v. *City of Akron*, 246 U. S. 242, 251; *Adirondack Ry.* v. *New York State*, 176 U. S. 335, 349; *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Boom Co.* v. *Patterson*, 98 U. S. 403, 406. See also: "The federal statute . . . does not require proof of 'necessity,' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." *United States* v. *State of Montana*, 134 F. 2d 194, 197, cert. denied, 319 U. S. 772.